

**IN THE HIGH COURT OF JUDICATURE OF BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

CHAMBER SUMMONS NO.653 OF 2005
IN
EXECUTION APPLICATION NO.453 OF 2003
IN
SUIT NO.1341 OF 1998

Jetu Jacques Taru LalVani, ..Plaintiff.

V/s.

Shreeji Mineral Waters Pvt.Ltd. & Ors. ..Defendants.

And

Indu Jagdish Parekh. Applicant.

Mr.Birendra Saraf i/b A.Bharat & Co. for applicant.

Mr.M.K.Madnaney with Sudhas Patil for plaintiff.

CORAM: A.M.KHANWILKAR, J

DATE : SEPTEMBER 21, 2005.

P.C. :

1. Heard counsel for the parties. Perused the pleadings.

2. This chamber summons is taken out by Indu Jagdish Parekh for raising of attachment in respect of flat No.24, New Ideal Co-operative Housing Society Ltd., Milan 87, Tardeo, Mumbai 400 034. According to the applicant, she is the sole owner of the said flat. The applicant however, accepts the position that Judgment debtor No.3 Smt. Rita Jayant Parekh

was one of the co-owner alongwith applicant and one Smt.Mala Bipin Parekh, as is reflected from the share certificate issued by the New Ideal Cooperative Housing Society, under which interest in the premises is obtained. It is only in December, 1999, applicant's name has been shown as sole owner of the shares and consequently having proprietary interest in the subject flat. It is on this basis, it is contended that the award which is put in execution by way of Execution Application No.453 of 2003 against the Judgment debtor No.3, cannot be the basis to proceed against the applicant in respect of the subject flat, which is now exclusively owned by the applicant.

3. This argument clearly overlooks the documents on record. The co-owners Smt. Mala Parekh and Smt.Rita Parekh had applied to the Society on 6th August, 1996 that their names be deleted from the share certificate as they have agreed to relinquish their rights in the subject flat without any consideration therefor. It is on that application, the Society allowed the request and effected the amendment in the Share Certificate by which now the applicant is shown as the sole-owner thereof. The question raised on behalf of the Judgment creditor is

that the nature of transaction is such, that it amounts to gift. Admittedly, Gift deed is not registered. Accordingly, transfer of share though given effect to by the society, will be of no avail as there is no transfer of interest of two other co-owners in the subject flat, in law. This is so because Section 17 of the Registration Act mandates instrument of gift of immovable properties to be compulsorily registered. The nature of transaction, so as to transfer the interest in the immovable property in favour of the applicant by the Judgment debtor No.3 as well as other co-owner, amounts to gift. It is conceded that that transaction has not been registered. If the Judgment Creditor is right in contending that the nature of transaction amounts to gift within the meaning of Section 122 of the Transfer of Property Act, then issue is covered by my Judgment dated July 22, 2005 in Chamber summons No.731 of 2005(Jetu J.Lalvani V/s Solestrap Industries P.ltd. & Ors.).

4. As mentioned earlier, the application submitted by the Judgment Debtor No.3 and Mala Bipin Parekh, who were also co-owners alongwith the applicant in respect of the subject flat, to the Society mentions that they have agreed to relinquish

their right in the flat without receiving consideration therefor. If it is so, it will fall within the expansive meaning of Gift in terms of Section 122 of the Transfer of Property act. Section 122 reads thus.

"122. "Gift" defined.- "Gift" is the transfer of certain existing moveable or immovable property made voluntarily and without consideration, by one person, called the donor, to another, called the donee, and accepted by or on behalf of the donee.

Acceptance when to be made.- Such acceptance must be made during the lifetime of the donor and while he is still capable of giving.

If the donee dies before acceptance, the gift is void."

5. To get over this position, counsel for the applicant contends that gift would involve voluntary disposal of property by owner and acceptance thereof. In the case of relinquishment, however, it is only a case of unilateral declaration of the position not

dependant on the acceptance of either party, for which reason, it is not a gift. To support this position, reliance is placed on the decision of the Apex Court in the case of **Commissioner of Income Tax, Gujarat V/s. Mrinalini V.Sarabhai(Smt.)**, (1998) 9 S.C.C. 194, where the Apex Court has observed that release of rights is unilateral act and being unilateral act, it is not a transaction exigible to gift tax within the meaning of the Gift Tax Act. That decision however, is on the application of provisions of Gift Tax Act. On the other hand, we are concerned with the question whether transaction such as the present one is covered by the expansive meaning of gift within the definition under Section 122 of the Transfer of Property Act. In the present case, it is seen that the Judgment Debtor No.3 alongwith Mala Bipin Parekh submitted an application to the society expressing that they were relinquishing their right in the said flat in favour of applicant without receiving any consideration therefor. On the basis of this application, Society has acted upon and then recorded change in the share certificate which now mentions only the name of the applicant. The applicant has accepted that position. The act of relinquishment was in relation to the interest in the immovable property though that occurs

due to the transfer of shares. In other words, the applicant has accepted the transfer of interest in the immovable property effected by way of relinquishment by the co-owners. If it is so, it would fall within the definition of Gift of immovable property within the section 122 of Transfer of Property Act. Indeed, expression relinquishment is not defined in the Transfer of Property Act but dictionary meaning thereof is abandonment of right or abatement of right. The concomitant of abandonment or relinquishment of right of one devolves that corresponding right in favour of the other which has the effect of transfer by way of gift within the expansive definition under section 122 of the Transfer of Property Act. Such gift has to be registered so that in law transfer will take effect in view of exposition in the case of **Jetu Lalvani(supra)**.

6. To get over this position, counsel for the applicant submits that the decision in Jetu Lalvani's case(supra) will have to be reconsidered. According to the applicant, the decision in the case of **Usha Arvind Dongre (reported in 1990(3) Bom.C.R.389)** has been misconstrued. It is contended that the said decision is in two parts. In the first part,

reference is made to the provisions of section 41 of the Maharashtra co-operative Societies Act, 1960 on account of which provisions of section 17(1)(b) of the Registration Act are not applicable. It is argued that from the observations in paragraph-11 of the said decision in **Usha Arvind Dongre**(supra), it is obvious that the court went on to observe that in the case of a tenant co-partnership housing society the title to the flat remains in the society and is not affected by the transfer of shares in the society. Only the right to occupy a flat flows from the ownership of share in such a cooperative society. The shares, thereby do not become immovable property. In my opinion, this submission is ill-advised. That Judgment will have to be read as a whole. The ratio of that Judgment is that to effect transfer of Shares by non-testamentary instrument it is not necessary to be registered in view of the non-obstante clause in section 41 of Maharashtra Co-operative Societies Act, 1960. It is therefore, not possible to agree with the argument as is canvassed across the bar by the Applicant.

7. Counsel for the applicant would then contend that in the present case, transaction is covered by section 17 (1)(b) of the Registration Act. This

submission is made relying on the wording of Section 17(1)(b), which reads thus.

Sec.17(1)(b): other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

According to the learned counsel relinquishment of any right in the property will be a non-testamentary instrument covered by the Section 17(1)(b), in which case, decision of this court in the case of **Usha Arvind** (supra) will apply. It is not possible to accept this submission. Transaction, in the present case, is clearly one of relinquishment of right in the flat in question by the Judgment debtor-3 without receiving any consideration therefor. That relinquishment has been acted upon not only by the society but also by the applicant. If it is so, it comes within the purview of Gift within the meaning under section 122 of the Transfer of Property act.

In which case, it will be covered only by clause (a) of section 17(1) of Registration Act. Thus understood, it will have to be concluded that the Judgment debtor No.3 Rita J.Parekh continues to have right in the subject flat which position is fortified from the share certificate placed on record at page 14 mentioning entry of Judgment Debtor No.3 as Joint member in the share certificate and flat in question. The Judgment Debtor No.3 has been shown as co-owner in the share certificate. It presupposes that she has contributed for the purchase of the said flat. To effect valid transfer of interest in the flat, that can be done by non-testamentary instrument for consideration which need not be registered, but if effect by way of gift or no consideration registration of such instrument is imperative.

8. Accordingly, this application should fail as the attachment is confined to the right, title and interest of the Judgment Debtor No.3 in respect of the subject flat, to which no interference is warranted. Hence rejected.

9. At this stage, counsel for the applicant prays that this order passed today may not be given effect to for a period of four weeks from today.

Ordered accordingly, so as to enable the applicant to take up the matter in appeal as may be advised.